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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 210

MACK B. THOMPSON,
Petitioner

— VS —

STATE OF NORTH CAROLINA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

Supreme Court of the United States

October Term, 1962

No. 721

MACK B. THOMPSON,
Petitioner

— VS —

STATE OF NORTH CAROLINA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above entitled case on March 28, 1962.

Citations To Opinions Below

The judgment of the Superior Court of Alamance County was entered without opinion. The opinion of the Supreme Court of North Carolina (R p. 12), printed in Appendix hereto, infra, p. 12, is reported in N. C. , 124 S.E. 2d 728.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on March 28, 1962. R p. 12;

p. 12, infra. The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3).

The issue presented in this petition for a writ of certiorari was not raised as a federal question in the State Courts below for the following reasons. In the trial of the petitioner in the General County Court of Alamance County February 20, 1961, and again in the Alamance County Superior Court on March 8, 1961, the question of the sufficiency of the search warrant involved in the prosecution of the petitioner was raised by a motion to suppress the evidence on the ground that it was obtained under a defective and illegal search warrant. (R. p. 24). The question of the sufficiency of the warrant to meet the requirements of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States was not raised because prior decisions of this court, including *Wolf v. Colorado*, 338 U.S. 25 (1949), had made it clear beyond any doubt that this was not a federal constitutional question. After the petitioner had been convicted in the General County Court of Alamance County and in a trial de novo in the Alamance County Superior Court, and after the record on appeal to the North Carolina Supreme Court had been made up and filed, this court handed down the opinion in Mapp vs. Ohio, 367 U.S. 643 (1961), holding "that all evidence obtained by searches and seizures in violation of the constitution is, by that same authority, inadmissible in a state court." Mapp v. Ohio, 367 U.S. 643, at 655.

Questions Presented

1. Whether *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), has any retroactive effect.

2. Whether the failure to raise the issue involved in this case as a federal constitutional question in the state courts below precludes the petitioner from raising the constitutional issue on petition for writ of certiorari to this court.

3. Whether a conviction based totally on the admission of evidence obtained by a search and seizure under a warrant which fails to specify the place to be searched is violative of the due process provisions of the Fourteenth Amendment.

Constitutional Provision and Statutes Involved

The constitutional provisions involved are: United States Constitution, Fourth Amendment, Fifth Amendment and Fourteenth Amendment, Section 1, set out in Appendix hereto, infra, p. 9. The statutory provisions involved are 28 U.S.C., Section 257 (3); United States Supreme Court Rule 23 (1), (f); and North Carolina General Statutes, Section 18-13, set out in Appendix hereto, infra, p. 10.

Statement

The petitioner, M. B. Thompson, was arrested on December 17, 1960, on a warrant charging him with unlawfully and wilfully keeping in his possession illegal intoxicating liquor for the purpose of sale. The evidence upon which this charge was based in

the Alamance General County Court, the Superior Court of Alamance County and the Supreme Court of North Carolina was obtained by a search under a warrant for search and seizure of intoxicating liquor. (See Appendix hereto, infra, p. 24).

Petitioner was tried on this charge February 20, 1961, in the Alamance General County Court, found guilty, and given a suspended sentence on condition that he pay a fine of one hundred dollars ($100.00) and costs. He appealed to the Superior Court of Alamance County and on March 8, 1961, was found guilty after a trial de novo and sentenced to six months in the County jail to be assigned to work under the state prison department. He then appealed to the North Carolina Supreme Court which found no error in State v. Mack B. Thompson—N.C. 124 S.E. 2d 728 (1962). (See Appendix hereto, infra, p. 35).

In the Alamance General County Court and in the Superior Court of Alamance County the Petitioner contended that the search warrant was defective on its face in that it failed to meet the requirements of North Carolina General Statutes, Section 18-13, and North Carolina Constitution, Article I, Section 15, that the place to be searched be described with particularity. (R. p. 27).

Reasons For Granting The Writ

This case involves substantial questions affecting important constitutional rights.

1. The writ of certiorari should be granted because the issue of whether a criminal defendant is protected by a decision re-construing his constitutional rights after he has been convicted in state courts of limited and general jurisdiction is an issue which has not been authoritatively settled by this Court. *Norton v. Shelby County*, 118 U.S. 425 (1886); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). Although *Norton v. Shelby County*, cited supra, dealt with the constitutionality of a statute, the case squarely held that no rights could be gained or acquired under the statute even prior to the declaration of its unconstitutionality because, in legal contemplation, such a statute is as inoperative as though it had never been passed, and petitioner believes that this principle may apply as well to a judicial decision overruled because unconstitutional. On the other hand, the Chicot County Drainage District case, cited supra, indicated that the petitioner may be estopped by the principle of res judicata. These two cases seem to indicate a possible conflict in decisions of this court on an issue material to the constitutional rights of the petitioner.

2. The failure to raise the issue involved in this case as a federal constitutional question in the courts below should not preclude the petitioner from raising the constitutional issue on petition for writ of certiorari to this court because at the time of the trial

of this case the admission of evidence obtained by an illegal search and seizure was not proscribed by the federal constitution. Indeed, counsel for petitioner was no doubt deterred by the law as it stood prior to June 19, 1961, and as represented by *Wolf v. Colorado*, 338 U.S. 25. In fact, in *Mezzatesta v. Delaware*, 199 F. Supp. 494 (D. Del. Nov. 16, 1961) the United States District Court, in an application for writ of habeas corpus from a pre-*Mapp v. Ohio*, 367 U.S. 643, conviction, indicated that petition for writ of certiorari to this court would be the proper remedy for petitioner rather than habeas corpus, in the following language:

> Petitioners must first have exhausted available state remedies. Mazzatesta and Williams have made no application for a writ of certiorari to issue from the United States Supreme Court. . . . Counsel in oral argument stated that the long standing rule of the Supreme Court as laid down in *Wolf v. People of the State of Colorado* . . . deterred him from applying for the writ of certiorari as to issues related to the admission of evidence allegedly illegally seized in connection with the State criminal action. But this is no cogent reason for the present court to allow petitioners to circumvent the rule with respect to application for certiorari.

3. A conviction based totally on the admission of evidence obtained by a search and seizure under a warrant which fails to specify the place to be searched is believed to be violative of the due process provi-

sions of the Fourteenth Amendment. Petitioner's contention is posited on the assumption that the search warrant under which the evidence was obtained for his conviction is defective in that it fails to describe the place to be searched with sufficient particularity.

In as much as *Mapp v. Ohio*, 367 U.S. 643, dealt with a search and seizure without a warrant, petitioner's query is whether the principle enunciated in the Mapp case will cover a case involving the admission of evidence obtained in a search and seizure made under a warrant defective for the reason that it failed to particularize the place to be searched. It would seem that the question presented here is of importance in the administration of state criminal procedure. Settlement of the question by this court is plainly in the public interest since it is likely to be presented in many state criminal proceedings involving search and seizure, perhaps including many cases now pending.

Since Mapp v. Ohio was based on the Fourth and perhaps Fifth amendments, it would seem that a search warrant used in State criminal proceedings must now meet the requisites of the Fourth Amendment. One of these requisites is the specification of the place to be searched.

CONCLUSION

WHEREFORE, for the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

C. O. PEARSON
W. G. PEARSON, II
Durham, North Carolina
Attorneys for Petitioner

APPENDIX

Constitutional and Statutory Provisions Relied on:

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, SEC. 1

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTE OF NORTH CAROLINA 18-13

Search warrants; disposal of liquor, equipment and materials seized.—Upon the filing of a complaint under oath by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information; and if such liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, be found in any such place or places, to seize and take into his custody all such liquor, and to seize and take into his custody all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling or manufacturing intoxicating liquor which may be found at such place or places, and to keep the same

subject to the order of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquor or other property alleged to be used in carrying on the business of selling or manufacturing intoxicating liquor as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All liquor, and all equipment or materials designed or intended for use in the manufacture of intoxicating liquor, seized under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall within ten days upon conviction or default of appearance of such person be destroyed: Provided that any tax-paid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes, or sell it to legalized alcoholic beverage control stores within the State of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. (1923, c. 1, s. 12; C. S., s. 3411 (1); 1939, c. 12; 1941, c. 310; 1957, c. 1235, s. 3.)

NORTH CAROLINA SUPREME COURT

Spring Term 1962

No. 721—Alamance

STATE

v.

MACK B. THOMPSON

Appeal by defendant from Clark, J., March Criminal Term, 1961, of Alamance, docketed and argued as No. 721 at Fall Term, 1961.

Criminal prosecution on warrant charging that defendant, on December 17, 1960, unlawfully and wilfully "did have and keep in his possession illegal intoxicating liquors, to wit: 21 pints tax paid whiskey for the purpose of sale, located in the Orange Bowl, Supper Club, Mebane, N. C., contrary to the form of the statute . . ."

Upon trial de novo in the Superior Court (on appeal by defendant from conviction and judgment in the General County Court of Alamance County), the only evidence was that offered by the State. It consists of the testimony of John Crabtree and Wade Montgomery, each a Deputy Sheriff of Alamance County, and tends to show the facts stated below.

On December 17, 1960, and prior thereto, defendant was the owner of premises on which he operated a place of business known as the Orange Bowl Supper Club. The business was conducted in "a long building," in which there was a dance hall, tables, a piccolo, a stage, dressing rooms, and a kitchen. There

was "a bar type structure in the dance floor," with a counter approximately twenty to thirty feet long. A door behind the counter "leads in the kitchen." The kitchen had a window "about four or five feet wide where they put orders through."

On the night of December 17, 1960, the officers, under authority of a warrant therefor, searched the said premises. In brown paper bags, sitting on the floor of the kitchen near the refrigerator, there were twenty-one full (sealed) pints of different kinds of tax paid whiskey. In a five-gallon bucket (used as a trash can) under the end of the kitchen table, there were five or more empty whiskey bottles, "with the odor of whiskey in them," and a number of small paper cups. Numerous "whiskey cups, about 3-oz. paper cups," were "at the end of the table," and "five empty bottles and cups (were) out under the counter."

When the search was made, "there was one man at the counter and there were some musicians on the stage and several people were back at the door." Defendant was not on the premises when the search was made. Later, he stated "he had gone to get his cook."

Deputy Sheriff Montgomery testified: "He (defendant) came up twice while his case was pending in County Court and wanted to know if it would be satisfactory with us if he would plead guilty to illegal possession and we said that was up to the Court whether they would accept it or not."

The jury found the defendant "Guilty as charged

in the warrant," and judgment was pronounced as appears in the record. Defendant excepted and appealed.

Attorney General Bruton and Assistant Attorney General Rountree for the State.

Walter D. Barrett, M. Hugh Thompson and William A. Marsh, Jr., for defendant, appellant.

BOBBITT, J. The only assignment of error brought forward and discussed in defendant's brief is based on his exception to the overruling of his motion for judgment as in case of nonsuit. Hence, all other assignments of error are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

The only question presented by a motion under GS 15-173 for judgment as in case of nonsuit is whether the evidence is sufficient to require submission to the jury. S. v. Green, 251 NC 40, 110 SE 2d 609. In passing on such motion, "the evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom." S. v. Corl, 250 NC 252, 108 SE 2d 608.

Clearly, if the twenty-one pints of whiskey were in the actual or constructive possession of defendant, there was ample evidence to support the verdict. GS 18-32; S. v. Rogers, 252 NC 499, 114 SE 2d 355, and cases cited.

Defendant contends the evidence is insufficient to support a finding that the twenty-one pints of

whiskey were in defendant's constructive possession.

As to what constitutes constructive possession, Varser, J., in S. v. Meyers, 190 NC 239, 129 SE 600, said: "If the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual." This statement has been quoted with approval in later cases, e.g., S. v. Harrelson, 245, NC 604; 606, 96 SE 2d 867. It is stated in S. v. Taylor, 250 NC 363, 366, 108 SE 2d 629: ". . . if nontaxpaid whiskey is on a person's premises with his knowledge and consent, he has constructive possession thereof while it remains on premises under his exclusive control."

Even so, defendant contends the circumstantial evidence upon which the State relies is insufficient to show defendant had constructive possession of the twenty-one pints of whiskey in that the facts shown are not inconsistent with defendant's innocence.

In S. v. Stephens, 244 NC 380, 383, 93 SE 2d 431, this Court, in opinion by Higgins, J., said: "We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in S. v. Simmons, 240 NC 780, 83 SE 2d 904, quoting from S. v. Johnson, 199 NC 429, 154 SE 730: 'If there be any evidence tending to prove the fact in issue or which reasonably

conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury."

Under the rule stated in S. v. Stephens, supra, and approved in later decisions, this Court is of opinion, and so decides, that there was substantial and therefore sufficient evidence to support a finding that the twenty-one pints of whiskey were in the constructive possession of defendant and to support a verdict of guilty. Hence, defendant's motion for judgment as in case of nonsuit was properly overruled.

In S. v. Hunt, 253 NC 811, 117 SE 2d 752, cited by defendant, decision was based on a materially different factual situation.

No error.

Sharp, J., took no part in the consideration or decision of this case.

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1962

No. 721—Alamance

STATE

v.

MACK B. THOMPSON

This cause came on to be argued upon the transcript of the record from the Superior Court Alamance County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable William H. Bobbitt Justice, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the defendant and sureties to the appeal bond, Cora Lee Thompson and Delacy Thompson, do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-

Four and 25/100 dollars ($34.25), and execution issue therefor. Certified to Superior Court this 9th day of April 1962.

A TRUE COPY

ADRIAN J. NEWTON
Clerk of the Superior Court

By s/ Sarah B. Hanner
Sarah B. Hanner, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE

v.

MACK B. THOMPSON

Appeal docketed	13 July 1961
Addendum to record filed	18 November 1961
Case argued	12 December 1961
Opinion filed	28 March 1962
Final judgment entered	28 March 1962

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 22nd day of May, 1962.

ADRIAN J. NEWTON

Clerk of the Supreme Court of the State of North Carolina

(SEAL)

No. 721 FIFTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1962

STATE OF NORTH CAROLINA

v.

MACK B. THOMPSON

From Alamance

Before CLARK, J., March 1961 Criminal Term, Alamance Superior Court. DEFENDANT Appealed.

Stipulation of Solicitor for the State and Counsel for Defendant on Appeal

The Solicitor for the Fifteenth Judicial District of North Carolina and counsel for defendant hereby stipulate and agree that upon the trial of the above-entitled case, the Court was properly organized and that the defendant was duly before the Court and represented by counsel.

THOMAS D. COOPER, Asst. Solicitor for
Tenth Solicitorial District of N.C.

WALTER D. BARRETT,
Counsel for Defendant.

STATEMENT OF CASE ON APPEAL

This is a criminal action in which the defendant was tried upon a plea of not guilty at the March Criminal Term of the Superior Court of Alamance

County before the Honorable Heman R. Clark, Judge Presiding, and a jury, upon a warrant charging the defendant with the illegal possession of intoxicating liquors for the purpose of sale. From a verdict of guilty and judgment imposing prison sentence, the defendant in open court gave notice of appeal to the Supreme Court of North Carolina.

STATE WARRANT, Complete.

STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE
GRAHAM TOWNSHIP
STATE
v.
M. B. THOMPSON
Maple Ave. Burlington, N. C.
JUSTICE'S COURT
Before C. C. BAYLIFF,
Justice of the Peace
CRIMINAL ACTION

W. H. Montgomery, being duly sworn, complains and says that at and in said County of Alamance, Melville Township, on or about the 17th day of December, 1960, M. B. Thompson did unlawfully, willfully have and keep in his possession illegal intoxicating liquors, to wit: 21 pints tax-paid whiskey for the purpose of sale, located in the Orange Bowl, Supper Club, Mebane, N. C., contrary to the form of the statute and against the peace and dignity of the State.

W. H. MONTGOMERY

Subscribed and sworn to before me this 17th day of Dec., 1960.

C. C. BAYLIFF
Justice of the Peace.

STATE OF NORTH CAROLINA

To Any Lawful Officer of Alamance County—

GREETING:

You are hereby commanded forthwith to arrest M. B. Thompson and him safely keep, so that you have him before me at my office in said County immediately, to answer the above complaint, and be dealt with as the law directs.

Given under my hand and private seal, this 17th day of December, 1960.

C. C. BAYLIFF (Seal)
Justice of the Peace.

JUDGMENT

After hearing the evidence in this case, it is adjudged that the defendant M. B. Thompson is guilty.

It is further ordered and adjudged that the defendant give a justified bond in the sum of $200.00 Dollars for his appearance at the General County Court of Alamance County, to be held in Graham on the 23rd day of January, 1960, and in default thereof be committed to jail.

C. C. BAYLIFF (Seal)
Justice of the Peace.

RECOGNIZANCE OF DEFENDANT, WITH SURETIES

COUNTY OF ALAMANCE, SS

THE STATE

vs.

M. B. Thompson

BEFORE

C. C. BAYLIFF,
Justice of the Peace.

We, M. B. Thompson and Jim Isley, of said County, acknowledge ourselves indebted to the State of North Carolina in the sum of 200.00 Dollars.

The condition of this obligation is such that, if the said Subject shall personally appear at the next term of G.C.C. Court to be held in and for the County of Alamance, on the 23 day of Jan 1961 next, then and there to answer to a charge to be preferred against for Ill Poss for sale and shall not depart said Court without leave, then this obligation to be void; otherwise, to remain in full force and effect.

M. B. THOMPSON (Seal)

JIM ISLEY (Seal)

Taken, subscribed and acknowledged; this 18 day of Dec., 1960, before me.

T. P. SYKES

Jim Isley, being duly sworn, saith that he is worth, above all liabilities and exemptions allowed by law, the sum of $200.00.

JIM ISLEY

Subscribed and sworn to before me this 18 day of Dec., 1960.

T. P. SYKES
Justice of the Peace.

No. THE STATE v. M. B. Thompson
WARRANT Ill. Poss. for Sale

The Officer will SUMMONS FOR THE STATE

W. H. Montgomery
J. E. Crabtree
S. D. George
Harvey Shoffner

The Officer will SUMMONS FOR THE DEFENDANT

Received the 17th day of December, 1960.
Executed the 18th day of December, 1960.

JOE W. COLE, Sheriff.
Per: T. P. SYKES; D.S.

STATE'S EXH. 1

WARRANT FOR SEARCH AND SEIZURE OF INTOXICATING LIQUORS

STATE OF NORTH CAROLINA,
ALAMANCE COUNTY

STATE

v.

The Orange Bowl & Jeff Coleman & M. B. Thompson

Before C. C. BAYLIFF,
Justice of the Peace.

COMPLAINT AND SEARCH WARRANT

J. E. Crabtree, on information & Belief, an officer with the execution of the law, says under oath, that he is informed and believes that The Orange Bowl Supper Club, Jeff Coleman & M. B. Thompson have in their possession intoxicating liquors for the purpose of sale located in his dwelling, garage, filling station, barns, and outhouses, and premises and automobile, which is located on a dirt road and near Mebane which is located in Melville Township, Alamance County, N. C.

J. E. CRABTREE, Affiant.

Subscribed and sworn to before me an acting Justice of the Peace. This 17th day of December, 1960.

C. C. BAYLIFF, J.P.

NORTH CAROLINA,
ALAMANCE COUNTY.

To the Sheriff or any lawful officer, Greetings.

Whereas information has been furnished me by J. E. Crabtree, on Information & Belief, an officer charged with the execution of the law says under oath, that The Orange Bowl Supper Club, Jeff Coleman & M. B. Thompson have in their possession intoxicating liquors for the purpose of sale, located as above stated, you are authorized and commanded, to enter upon said premises and make search of same. Seizing all intoxicating liquors, containers, and other articles used in carrying on the illegal handling of intoxicating liquors. Herein fail not, and make due returns of this warrant.

This 17th day of December, 1960.

C. C. BAYLIFF, J.P.

No. THE STATE v. The Orange Bowl Supper Club, Jeff Coleman & M. B. Thompson, Mebane, N. C.

WARRANT FOR SEARCH AND SEIZURE OF INTOXICATING LIQUORS

Read Search Warrant to Robt. Saunders.

J. W. COLEMAN, Sheriff.

W. H. MONTGOMERY, D.S.

Received the 17th day of December, 1960.
Executed the 17th day of December, 1960.

STATE'S EVIDENCE

JOHN CRABTREE—Direct Examination:

I am and was a deputy sheriff of Alamance County on December 17, 1960. I have known the defendant M. B. Thompson about ten or eleven years and am familiar with a place of business known as the Orange Bowl Supper Club. This place is east of Graham and near Mebane, off Holt Street Extension back in the edge of some woods near a trash dump of the City of Mebane. It is a long building and I would say considered a dance hall with kitchen facilities to serve meals and they have tables in the place and a piccolo.

Q Do you know who owns the Orange Bowl Supper Club, Mr. Crabtree?

A Yes, sir.

Objection—Overruled—Exception.

EXCEPTION No. 1.

M. B. Thompson owns the land and building. The business was operating the night I was out there.

Q You know who owns the business that was operating that night, Mr. Crabtree?

Objection—Overruled—Exception.

EXCEPTION No. 2.

A Mack Thompson told me that he was operating the business. I went to the Orange Bowl Supper Club on the night of December 17.

Q Explain to the Court and the Jury what you found there that evening, Mr. Crabtree.

Objection—Overruled—Exception.

EXCEPTION No. 3

THE COURT:

Q Did you have a search warrant?

A Yes, sir, we did.

Q Do you have it here?

A Yes, sir.

MR. BARRETT:

Q Mr. Crabtree, is this the search warrant you searched under?

A It is.

The defendant would like to make a motion to suppress State's evidence obtained under that search warrant.

Motion denied—Exception.

EXCEPTION No. 4.

(Search warrant appears in the Record, p. 24).

Q What did you find, Mr. Crabtree, at the Orange Bowl?

Objection—Overruled—Exception.

EXCEPTION No. 5.

A There in the kitchen part of the supper club, on the floor in brown paper bags, were 21 pints of different kinds of taxpaid whiskey with whiskey store stamps on them. The defendant was not present at the time I found the liquor. I had been to this place of business about two weeks before. The defendant was present on that occasion and we went in and talked to Mack and he showed us around the building. He invited us to look around the building with him. He showed us the stage, dressing rooms, kitchen and the equipment and around over the place.

I had a conversation with the defendant on that evening and he said, "We are going to run this," and this man Coleman's name was included in the search warrant. Mack said, "Coleman is going to help manage it for me." Mr. Coleman was there at the time we were talking, but he was not there on the night of December 17th when we found the 21 pints. At the time we found the 21 pints, there was one man at the counter and there were some musicians on the stage and several people were back at the door. I did not count them, several folks around. Mack talked with me several times after this about this charge and he said that on the night we found the whiskey he had gone to get his cook. He did not say anything

about being at this place of business on this particular date, December 17th.

CROSS EXAMINATION

At the time when I was there, two weeks prior to December 17, this Coleman and several other people were around, and Mack told me that the Orange Bowl Supper Club was a club and since that time he has told me that it is a membership club. It is designated as the Orange Bowl Supper Club in the warrant.

COURT: You said that when you went in this place, at that time, there were 21 pints in the kitchen?

A Yes, sir; they were setting on the floor in paper bags over near the refrigerator, all in full pints, seals on them, no whiskey open, and we found no other whiskey there.

REDIRECT EXAMINATION (By Mr. Cooper)

I found some empty bottles and some cups and a five-gallon bucket in the kitchen. I believe eight empty pint whiskey bottles and small paper cups—I did not count the number of cups.

COURT: What basket you talking about these eight empty bottles were in?

A Five-gallon, what they were using for disposal of garbage.

COURT: A trash barrel?

A Yes, sir.

COURT: Where were these trash cans?

A There was one in the kitchen and one under the counter just out of the kitchen.

COURT: Both inside the house; is that correct?

A Yes, sir.

WADE MONTGOMERY testified:

I am and was Deputy Sheriff of Alamance County on December 17, 1960, and accompanied Mr. Crabtree to the Orange Bowl on that evening. I went into the kitchen of the establishment.

Q What did you find in there?

Objection—Overruled—Exception.

EXCEPTION No. 6.

A 21 pints of taxpaid whiskey. The bottles had the liquor store stamps on them of the same date that we were there. I found in the kitchen five empty whiskey bottles with the odor of whiskey in them in a five-gallon bucket under the end of the kitchen table and at the end of the table numerous whiskey cups, about 3-oz. paper cups; also found five empty bottles and cups out under the counter.

There is a bar type structure in the dance floor and they have a counter that runs approximately 20 to 30 feet long and it has a door you can come around behind the counter that leads in the kitchen, and the kitchen has a window about four or five feet wide where they put orders through. I was at this place one week before we found the whiskey and talked with the defendant and he said that it was his and that he and Coleman were going to run it. Mr. Thompson showed me all over the place and we met Coleman and he carried us back and showed us the stage, rest rooms, and carried us back in the kitchen.

A few days after we indicted Mack for the whiskey, he said Coleman was not there any more, he left the week before. I did not talk with the defendant about his whereabouts on the night we went there, Mr. Crabtree did.

I have had conversations with the defendant subsequent to his arrest as to the charges against him. He came up twice while his case was pending in County Court and wanted to know if it would be satisfactory with us if he would plead guilty to illegal possession and we said that was up to the Court whether they would accept it or not.

CROSS EXAMINATION (By Mr. Barrett)

I saw Mack about one week before the time I arrested him. I saw him every few days, but did not have a conversation with him.

EVIDENCE FOR THE STATE

Motion of the defendant to dismiss as of nonsuit denied. Defendant excepts.

EXCEPTION No. 7.

DEFENDANT OFFERED NO EVIDENCE.

Defendant renews his motion to dismiss the case. Motion denied. Defendant excepts.

EXCEPTION No. 8.

JUDGMENT

No. 66 STATE OF NORTH CAROLINA

v.

M. B. THOMPSON

Illegal possession of whiskey for purpose of sale.

Plead not guilty.

This cause coming on to be heard, and being heard, the following jury was impaneled. (Names of jurors set out in judgment.)

The jury say for their verdict: Guilty as charged in the warrant.

Upon the coming in of the verdict, defendant moves to set the same aside. Motion denied. Defendant excepts.

EXCEPTION No. 9.

Defendant moves in arrest of judgment. Motion denied. Defendant excepts.

EXCEPTION No. 10.

Judgment of the Court is that defendant be confined to the common jail of Alamance County for a period of six months to be assigned to work under State Prison Department.

This 8th day of March, 1961.

HERMAN R. CLARK,
Judge Presiding.

To the signing of the foregoing judgment, defendant excepts.

EXCEPTION No. 11.

APPEAL ENTRIES

Defendant in open court gives notice of appeal to the Supreme Court of North Carolina. Appeal bond in the sum of $200.00 was adjudged sufficient.

Appearance bond in the sum of $3,000.00 is set. Defendant is allowed 60 days within which to make up and serve case on appeal. The State is allowed 30 days thereafter within which to file objection or counter-case.

HERMAN R. CLARK
Judge Presiding.

ASSIGNMENTS OF ERROR

Defendant assigns for error the following:

1. The action of the Court, as set out in EXCEPTION No. 1 (R p [27]), in allowing State's witness J. E. Crabtree to testify as to the ownership of the Orange Bowl Supper Club.

2. The action of the Court, as set out in EXCEPTION No. 2 (R p [27]), in permitting State's witness J. E. Crabtree to testify as to who was operating the business on the night of December 17, 1960.

3. The action of the Court, as set out in EXCEPTION No. 3 (R p [27]), in overruling defendant's objection to the question.

4. The action of the Court, as set out in EXCEPTION No. 4 (R p [28]), in overruling defendant's motion to suppress the State's evidence obtained under the search warrant that appears in the Record (p. 24).

5. The action of the Court, as set out in EXCEPTION No. 5 (R p [28]), in permitting State's witness J. E. Crabtree to testify as to what he found at the Orange Bowl Supper Club.

6. The action of the Court, as set out in EXCEPTION No. 6 (R p [30]), in permitting State's witness Wade Montgomery to testify as to what he found at the Orange Bowl Supper Club.

7. The action of the Court, as set out in EXCEPTION No. 7 (R p [31]), in refusing defendant's motion to dismiss the case at the close of the State's evidence.

8. The action of the Court, as set out in EXCEPTION No. 8 (R p [31]), in denying defendant's motion to dismiss as of nonsuit at the close of all the evidence.

9. The action of the Court, as set out in EXCEPTION No. 9 (R p [32]), in refusing defendant's motion to set the verdict aside.

10. The action of the Court, as set out in EXCEPTION No. 10 (R p [32]), in denying defendant's motion in arrest of judgment.

11. The action of the Court, as set out in EXCEPTION No. 11 (R p [32]), in signing the judgment as appears in the Record (p. [32]).

The defendant hereby tenders the foregoing as his statement of case and assignments of error in the foregoing case.

This the 14th day of April, 1961.

WALTER D. BARRETT (Graham, N. C.)
Counsel for Defendant.

Service and acceptance of the foregoing statement of case on appeal and assignments of error are hereby waived. Further notice and service is hereby waived. This the 14th day of April, 1961.

THOMAS D. COOPER, JR., Asst. Solicitor,
Tenth Solicitorial District of N. C.

(TRANSCRIPT CERTIFIED BY CLERK SUPERIOR COURT)

No. 721 FIFTEENTH DISTRICT
SUPREME COURT OF NORTH CAROLINA

Spring Term, 1962

STATE OF NORTH CAROLINA

v.

MACK B. THOMPSON
From Alamance

ADDENDUM TO RECORD
ALAMANCE COUNTY GENERAL COUNTY COURT
MONDAY, FEBRUARY 20, 1961

Pursuant to an order of recess, Court reconvened at 9:30 A.M. where the following proceedings were had, to wit:

No. 53002. State v. M. B. Thompson. Ill. Poss. of whiskey for sale. Plead not guilty. Found guilty. Judgment of the Court, let the defendant be confined to the common jail of Alamance County for a period of four months to be assigned to work under

the supervision of the State Prison Department. Execution of the prison sentence suspended on condition he pay a fine of $100.00 and cost. The defendant in open court gives notice of appeal. Let the defendant give bond in the amount of $200.00.

s/ W. L. SHOFFNER
Judge Presiding.

NORTH CAROLINA, ALAMANCE COUNTY
IN THE GENERAL COUNTY COURT

I hereby certify that the foregoing is a true copy of a portion of the minutes of the General County Court taken from and compared with Minute Docket Volume 11, pages 217, 221, and 224.

This the 17th day of November, 1961.

D. M. McLELLAND
Clerk of General County Court.

(SEAL OF GENERAL COUNTY COURT)

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In The

Supreme Court of The United States

October Term, 1962

No. [redacted] 210

MACK B. THOMPSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. W. BRUTON
Attorney General of North Carolina

G. ANDREW JONES, JR.
Assistant Attorney General

Counsel for Respondent

Address: Justice Building
Raleigh, North Carolina

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In The

Supreme Court of The United States

October Term, 1962

No. 721

MACK B. THOMPSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA; IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina affirming the conviction of the petitioner is reported as STATE v. MACK B. THOMPSON, 256 N. C. 593, 124 SE 2d 728. The opinion also appears in Appendix of the petitioner's petition, page 12.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Does the decision of MAPP v. OHIO, 367 U. S. 643 (1961)

give to the petitioner any safeguards not given to him by North Carolina General Statutes sec. 15-27.1 (1957)?

Did the petitioner properly raise and preserve any Federal Constitutional question according to State procedure and practice, in the Trial Court and the Supreme Court of North Carolina?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petitioner attempts to bring his case within the provisions of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States. Statutory provisions involved include General Statutes of North Carolina, sections 18-13 and 15-27.1, set out in Appendix hereto, pages 6 and 7. Rule 28, Rules of Practice in the Supreme Court, 254 N. C. 783, 810, is set forth in the Appendix, page 7.

STATEMENT OF THE CASE

The petitioner was originally convicted at the March Criminal Term, 1961, of Alamance County Superior Court under a warrant charging him with illegal possession of intoxicating liquors for the purpose of sale in a place of business known as The Orange Bowl Supper Club. Upon appeal to the Supreme Court of North Carolina, although eleven assignments of error were set forth, including assignments relating to the trial court's rulings upon admission of evidence secured pursuant to a search warrant, the only assignment of error brought forward and discussed in petitioner's brief was that relating to the overruling of petitioner's motion for judgment as in case of nonsuit. The Supreme Court of North Carolina found no error in the trial. STATE v. MACK B. THOMPSON, 256 N. C. 593, 124 S.E. 2d 728. The facts disclosed by the record of the case on appeal are set forth in the report of the case, Appendix to Petition, p. 12.

Petitioner now seeks a writ of certiorari in the Supreme Court of the United States.

ARGUMENT

I THE PROVISIONS OF NORTH CAROLINA GENERAL STATUTES SECTION 15-27.1 (1957), EXCLUDING EVIDENCE OBTAINED UNDER AN ILLEGAL SEARCH WARRANT, ARE TO THE SAME EFFECTS AS THIS COURT'S DECISION IN MAPP v. OHIO, 367 U. S. 643 (1961), THEREFORE ANY PROTECTION OF PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS GIVEN UNDER THE LATTER DECISION WERE AFFORDED TO HIM BY STATE LAW AT THE TIME OF HIS TRIAL.

The decision in WOLF v. COLORADO, 338 U. S. 25 (1949), which was in effect at the time of petitioner's trial, held "that in a prosecution in a State court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." (p. 33) In overruling that holding, this Court, in MAPP v. OHIO, 367 U. S. 643 (1961), enunciated the principle: "All evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State Court." (p. 655) The pertinent portion of North Carolina General Statutes section 15-27.1, enacted in 1957, is as follows:

> "No facts discovered or evidence obtained by reason of the issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under conditions requiring a search warrant, shall be competent as evidence in the trial of any action."

It is manifest that the terms "illegal" and "legal", as used in this section, connote compliance with the Fourth, Fifth, and Fourteenth Amendments to the Constitution. Thus, by mandate of State Statute, the trial court in which petitioner was convicted had determined the competency and admissibility of the evidence through inquiry as to the legality of the search warrant, including its legality under the Fourteenth Amendment. Although the Wolf decision had not been

overruled at the time of petitioner's trial, evidence which might otherwise have been admissible under its rule was made inadmissible by statute, and the later decision in MAPP v. OHIO granted to the petitioner no further protection than that which had been afforded him at his trial by said statute.

II THE PETITIONER DID NOT PROPERLY PRESENT ANY QUESTION AS TO THE DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT BEFORE THE TRIAL COURT OR BEFORE THE SUPREME COURT OF NORTH CAROLINA, AND THOSE COURTS DID NOT PASS UPON OR DETERMINE ANY FEDERAL CONSTITUTIONAL QUESTION.

Petitioner excepted to the ruling of the trial court as to the admissibility of evidence obtained under the search warrant, it is true, but the record discloses that he did not present the ruling for review upon appeal. Under Rule 28, Rules of Practice in the Supreme Court, 254 N. C. 783, 810, exceptions not set out in appellant's brief, or in support of which no argument is given or authority cited, are taken as abandoned by him.

The Supreme Court of North Carolina does not review constitutional questions unless they are properly raised and passed upon by the trial court (STATE v. JONES, 242 N. C. 563, 564, 89 S.E. 2d 129), and this practice is in conformity with decisions of the Supreme Court of the United States (EDELMAN v. CALIFORNIA, 344 U. S. 357, 358).

In PARKER v. MC LAIN, 237 U. S. 469, 59 L. Ed. 1051, on page 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

Petitioner brought forward and discussed in his brief on appeal only his exception to the overruling of his motion

for non-suit, thereby abandoning any other exceptions he may have made to the trial court's decisions. Not only has he failed to claim or set up any Federal right; he has failed to carry forward his exceptions to rulings based upon the state law which gives him, at the least, as great protection as does the decision in MAPP v. OHIO, supra.

CONCLUSION

It is respectfully submitted that the petitioner's obvious purpose is to reopen the case upon its merits, seeking a review of the trial court's decision that evidence obtained under the search warrant was admissible. Petitioner has not availed himself of his right to have this matter heard upon appeal to the Supreme Court of North Carolina, and he has presented nothing which tends to show a denial, by either the trial court or the Supreme Court of North Carolina, of any Federal right. The principle relied upon by petitioner, set forth in the MAPP v OHIO decision, is the same as that established by North Carolina General Statutes section 15-27.1, which was effective at the time of petitioner's trial and the hearing of his appeal before the Supreme Court of North Carolina.

Therefore, for the foregoing reasons, respondent State of North Carolina urges that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

T. W. BRUTON
Attorney General of North Carolina

G. Andrew Jones, Jr.
Assistant Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the State of North Carolina,
Respondent

APPENDIX

Applicable State Statutes involved:

General Statutes of North Carolina, Chapter 18, Section 13:

"Search warrants; disposal of liquor, equipment and materials seized.—Upon the filing of a complaint under oath by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information; and if such liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, be found in any such place or places, to seize and take into his custody all such liquor, and to seize and take into his custody all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling or manufacturing intoxicating liquor which may be found at such place or places, and to keep the same subject to the order of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquor or other property alleged to be used in carrying on the business of selling or manufacturing intoxicating liquor as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All liquor, and all equipment or materials designed or intended for use in the manufacture of intoxicating liquor, seized

under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall within ten days upon conviction or default of appearance of such person be destroyed: Provided that any tax-paid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes or sell it to legalized alcoholic beverage control stores within the State of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. (1923, c. 1, s. 12; C. S., s. 3411(1); 1939, c. 12; 1941, c. 310; 1957, c. 1235, s. 3.)"

General Statutes of North Carolina, Chapter 15, Section 27.1:

"Article applies to all search warrants; competency of evidence obtained by illegal search.—The provision of this article shall apply to search warrants issued for any purpose including those issued pursuant to the provisions of G. S. 18-13. No facts discovered or evidence obtained by reason of the issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under conditions requiring a search warrant, shall be competent as evidence in the trial of any action. (1957, c. 496.)" (Emphasis ours)

Rule 28, Rules of Practice in the Supreme Court, 254 N. C. 783, 810:

"Appellant's Brief.

"The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions. As to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, proper-

ly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

"Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or typewritten copies to be mimeographed of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the third Tuesday preceding the call of the district to which the case belongs the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief." (Emphasis ours)